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Supreme Court of the United States

October Term, 1975
No. 75-1242

CITY OF EUCLID, OHIO,
Petitioner,

vs.

ROYAL AMERICAN CORPORATION, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio

PAUL W. WALTER
CHARLES T. RIEHL
WALTER, HAVERFIELD, BUESCHER & CHOCKLEY
1215 Terminal Tower
Cleveland, Ohio 44113
(216) 781-1212
Attorneys for Petitioner

Of Counsel:
PATRICK R. ROCCO
Director of Law, City of Euclid
HENRY B. FISCHER
Assistant Director of Law,
City of Euclid
585 East 222nd Street
Euclid, Ohio 44123

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Supreme Court of the United States

October Term, 1975

No. .....

CITY OF EUCLID, OHIO,
Petitioner,

vs.

ROYAL AMERICAN CORPORATION, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio

Petitioner, the City of Euclid, Ohio, prays that a Writ of Certiorari issue to review the judgment of the Ohio Supreme Court entered on December 5, 1975, dismissing the appeal and overruling Appellant-Petitioner's Motion to Certify the Record to review the decision of the Court of Appeals of Cuyahoga County, Ohio, Eighth Appellate District, filed on August 21, 1975, reversing the decision of the Common Pleas Court of Cuyahoga County, Ohio, filed September 4, 1974.

CITATIONS TO OPINIONS BELOW

The Journal Entry of the Ohio Supreme Court is reported at 48 Ohio State Bar Association Report 1743 (December 15, 1975) and is set forth in the Appendix, *infra*, at page A1. The Opinion of the Court of Appeals for Cuyahoga County, Ohio, Eighth Appellate District is unre-

ported and is set forth in the Appendix, *infra*, at page A3. The Journal Entry of the Common Pleas Court of Cuyahoga County, Ohio, is unreported and is set forth in the Appendix, *infra*, at page A12.

JURISDICTION

The judgment of the Ohio Supreme Court was rendered and filed on December 5, 1975. The jurisdiction of this Court is invoked pursuant to Title 28, U.S.C. Section 1257 (3).

QUESTIONS PRESENTED FOR REVIEW

1. May a state court exercise its delegated authority to interpret and declare a municipal legislative enactment unconstitutional as violating the Equal Protection Clause of the Fourteenth Amendment without first ascertaining if the rights impinged by the legislative enactment are constitutionally "fundamental"?

2. May a state court in exercising its delegated authority to interpret the Equal Protection Clause of the Fourteenth Amendment substitute its priorities for the expenditure of taxpayer's money and for the furnishing of municipal services for those priorities established by the duly elected officials of the municipality?

3. Is a municipal legislative scheme which provides for once-a-week solid waste collection at single family and two-family dwellings, but not at apartments and condominiums, so arbitrary and irrational as to violate the apartment and condominium owners' fundamental constitutional rights under the Equal Protection Clause of the Fourteenth Amendment?

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CONSTITUTIONAL AND CITY ORDINANCE PROVISIONS INVOLVED

U. S. Const. Amend. XIV Sec. 1:

> ". . .; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

City of Euclid Ordinance 49-1974:

Ordinance No. 49-1974

By—Messrs. Chukayne, Eckart, Farrell,

Kosmetos, Otcasek, Simonelli,

Sustarsic, Takacs, Talty.

An emergency ordinance to supplement the Codified Ordinances of the City of Euclid by enacting new section 941.26 relating to the pick-up and collection of solid waste materials from multi-family, condominium, and commercial structures in the City of Euclid.

WHEREAS, this Council wishes to approve the action of the Administration of the City of Euclid on March 1, 1972 in discontinuing service for the collection of solid waste materials from apartment houses, condominiums, and commercial structures in the City of Euclid; and

WHEREAS, it has been determined by a Court of Common Pleas, Cuyahoga County, that such action must be approved and authorized by legislative action and must include apartment and condominium structures as a class and commercial structures as another class in accordance with the Court's opinion, but the Court stayed such injunction pending appeal to maintain the status-quo; and

WHEREAS, the subject matter of this ordinance constitutes an emergency in that the same provides for the usual daily operation of a municipal department,

NOW, THEREFORE, be it ordained by the Council of the City of Euclid, State of Ohio:

Section 1: That the Codified Ordinances of the City of Euclid, be and they are hereby supplemented by enacting new Section 941.26 thereof to read as follows:

941.26 STRUCTURES EXCLUDED.

The City will not collect any solid waste materials from (1) any apartment or condominium structures or (2) any commercial structures in the City of Euclid.

Section 2: That this ordinance is declared to be an emergency measure necessary for the immediate preservation of the public peace, safety and welfare of the citizens of the City of Euclid and for the daily operation of a municipal department, and provided it receives the two-thirds vote of all members of Council elected thereto, shall be in full force and effect from and after July 1, 1974.

Attest:
/s/ David A. Lawrence
Clerk of Council

Passed: Feb. 19, 1974

/s/ Michael Kosmetos
President of Council

Approved:
/s/ Harry J. Kunth
Mayor

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STATEMENT OF THE CASE

This case concerns a constitutional attack on the City of Euclid, Ohio, Ordinance No. 49-1974 which provides for the exclusion from city operated solid waste material collection of apartments, condominiums and commercial structures in the City of Euclid. Under the codified ordinances of the City of Euclid, the City has committed itself to provide once-a-week curbside solid waste pickups for single and two-family dwellings within the City, but, pursuant to Ordinance No. 49-1974 has stated:

> "The City will not collect any solid waste materials from (1) any apartment or condominium structures or (2) any commercial structures in the City of Euclid."

The constitutional attack on this ordinance was brought by the plaintiffs-respondents, several apartment owners within the municipality. They claim that the classifications set forth in the ordinance are discriminatory and unconstitutional in contravention of the Fourteenth Amendment to the United States Constitution.

Euclid is a suburb of, and physically adjoins, the City of Cleveland, Ohio. The population of the City according to the 1970 census approximated 71,000 people. At the time of trial in this matter in 1974, the City contained approximately 14,000 single family dwellings and 720 two-family structures. There were 49 apartment complexes, containing 9,169 apartment units and 268 condominium units within the City. The population of these apartments and condominium units at the time of trial approximated 27,500 residents or roughly 40% of the city's population.

Prior to the spring of 1972 the City provided once-a-week curbside solid waste collection service to both single and two-family dwellings as well as those apartment

and condominium complexes which requested the municipal service. It is estimated that approximately 1870 units within the municipality, out of the total 9169 units, requested this service.

In the spring of 1972 because of taxing and budgetary restraints, the Mayor and Service Director, as an administrative matter, determined that the City could no longer bear the burden of servicing the apartment and condominium units. Accordingly, by administrative order, the service to these multi-family dwellings was terminated. The plaintiffs, or their predecessors in interest, challenged this administrative decision in prior litigation on the grounds that under state law this determination could only be made by the legislative branch of the City's government. The courts agreed, although they intimated that the classification, if done legislatively, would be proper. Accordingly, on February 19, 1974, the City Council passed the ordinance under challenge herein, No. 49-1974, giving legislative authorization to the determination not to service apartment and condominium structures.

Euclid does not finance its solid waste collection through a user charge, but, rather, utilizes general operating revenues to fund this service. In recent years because of increased volumes of refuse material and more stringent restraints imposed by the Ohio Environmental Protection Agency, the collection, incineration and disposal of solid waste has become more expensive. For example, the municipality is now reviewing plans, necessitated by environmental considerations, to update its two 100 ton capacity incinerators to handle a capacity of 350 tons per day. The cost of this upgrading is estimated to be $10,000 per ton or $3,500,000.00 in total.

It was estimated at trial by the City's Superintendent of Solid Waste that if all apartment and condominium complexes required the City to provide solid waste col-

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lection, additional annual operating expenses of approximately $1,000,000.00 would be incurred and a capital investment for additional incinerator capacity and equipment could approximate $4,500,000.00.

The past taxing and budgetary restraints as well as the enormous potential financial outlays, taken out of general operating revenues, were not the only basis for the legislative determination to enact Ordinance 49-1974. Because of the physical layout of the apartment complexes, collection could only practically be effected by requiring municipal equipment to transgress on private property. Further, the nature of handling apartment complex waste, essentially located in "dumpsters", would require procuring new equipment and hiring or training personnel to operate these "dumpsters". Based on these considerations the municipality determined not to provide solid waste collection services to apartments or condominium complexes.

In this proceeding the trial court, the Common Pleas Court of Cuyahoga County, Ohio, upheld the constitutionality of Ordinance 49-1974 after a short hearing in which practically all evidentiary material was stipulated, thereby obviating the need for detailed factual findings. See Appendix A12. On appeal, the Cuyahoga County, Ohio, Court of Appeals, Eighth Appellate District, reversed, one judge dissenting, and found that the ordinance in question was unconstitutional in that it discriminated against apartment and condominium owners and residents. See Appendix A3. The Ohio Supreme Court declined to accept jurisdiction and review the Court of Appeals' decision. See Appendix A1. The Petitioner seeks to have this Court review the Court of Appeals' and Supreme Court's decision with respect to the constitutionality of the legislation excluding from municipally operated solid waste collection apartment and condominium structures.

REASONS FOR GRANTING THE WRIT

I. To Clarify the Standard of Review Applicable to Furnishing Discretionary Municipal Services When Challenged Under the Equal Protection Clause of the Fourteenth Amendment.

In applying the requirements of the Fourteenth Amendment to the defendants' policies of solid waste collection, the Ohio Court of Appeals, and implicitly the Ohio Supreme Court by declining to review the decision of the Court of Appeals, failed to resolve, or even consider, the nature of the constitutional right allegedly impinged by the Euclid ordinances. Rather than determining whether the apartment owners' rights were constitutionally "fundamental" so as to be protected by the Constitution, or whether the Euclid ordinance impinged upon some "inherently suspect" class, the Court of Appeals proceeded directly to the issue of whether, in its opinion, there was some "rational basis" for the municipal decision not to collect garbage from inhabitants of apartments and condominiums. In failing to analyze the nature of the constitutional claim asserted, the Ohio Court of Appeals' ruling directly controverts the recent decision of the United States Court of Appeals for the Seventh Circuit, *Goldstein v. City of Chicago*, 504 F. 2d 989 (7th Cir. 1974).

Goldstein presents exactly the same issue as the instant case; namely, the exclusion of multiple dwellings from solid waste collection. The Seventh Circuit, in upholding the Chicago legislation, found that multiple dwelling ownership is not an inherently suspect classification and garbage collection is not a fundamental right. See *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 61 (1973).

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The Seventh Circuit found a rational basis for the ordinance as follows:

> "The city contends and we agree that the ordinance does not distinguish between types of ownership but between types of building—single family home versus large multiple unit buildings—and that the reason for this distinction is that the owner(s) of large residential buildings with a great amount of garbage have more effective bargaining power with private scavenger services than the owner of a single unit.
>
> The city's distinction between types of residential structures in providing efficient sanitation is, in our judgment, reasonable. Accordingly, the ordinance does not violate the equal protection clause of the Fourteenth Amendment." 504 F. 2d at 992.

The case of *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), relied upon by the Ohio Court of Appeals, is not on point. *Yick Wo* dealt with unequal law enforcement by local officials in San Francisco based upon the race and national origin of the individuals involved. Similarly, municipal services were unequally provided based on race in *Hawkins v. Town of Shaw, Mississippi*, 437 F. 2d 1286 (5th Cir. 1971). However, this Court has repeatedly held that if the seeming inequality in the provision of municipal services does not affect a "suspect" class or impinge upon a constitutionally "fundamental" right, the municipality's actions will be upheld under a relaxed "rational basis" test. *Palmer v. Thompson*, 403 U.S. 217 (1971).

The *Palmer* case is of further significance since *Palmer* upheld Jackson, Mississippi's defenses of economic unfeasibility in closing their public swimming pools rather than operating them on a desegregated basis. If we consider the furnishing of municipal solid waste collection no different

from a constitutional standpoint than the operation of swimming pools, the following language from *Palmer* should serve as direct and controlling precedent in the instant case:

> "It has not been so many years since it was first deemed proper and lawful for cities to tax their citizens to build and operate swimming pools for the public. Probably few persons, prior to this case, would have imagined that cities would be forced by five lifetime judges to construct or refurbish swimming pools which they may choose not to operate for any reason, sound or unsound. Should citizens of Jackson or any other city be able to establish in court that public, tax supported swimming pools are being denied to one group because of color and supplied to another, they will be entitled to relief. That is not the case here." 403 U.S. at 227.

Further, the Ohio Court of Appeals violated proper constitutional analysis by substituting its judgment on the priorities of the furnishing of municipal services for those of the duly elected local officials. In so doing, the Ohio Court of Appeals violated this Court's ruling in *McGowen v. Maryland,* 366 U.S. 420, 425-26 (1961), wherein this Court held:

> "Although no precise formula has been developed, the Court has held the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only when the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. The

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statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."

In invalidating the Euclid Ordinance 49-1974, the Ohio Court of Appeals gave no credence to the municipality's justification of the increased cost of collection of multiple family dwelling's solid waste, the increased volumes produced by such dwellings and the different manner of garbage pickup required by such dwellings. The Court verbalized no more rationale for its decision than the following:

> "Citizens living in both types of residences require the removal of their garbage and rubbish on a regular basis for health and safety reasons. There is no rational basis for the municipal decision not to collect garbage from inhabitants of apartments on the one hand and to collect it from the inhabitants of residential dwellings on the other." See Appendix A8-A9, *infra*.

This Court in *Williams v. Lee Optical Co.*, 348 U.S. 483, 489 (1955) recognized the problems of legislative classifications:

> "The problem of legislative classification is a perennial one, admitting no doctrine definition. Evils in the field may be of different dimensions and proportions requiring different remedies. Or so the legislature may think. . . . Whether a form may take one step at a time addressing itself to the phase of the problem which seems most acute to the legislative mind. . . . the legislature may select one phase of a field and apply a remedy there, neglecting the others. . . . The prohibition of the Equal Protection Clause goes no further than the invidious discrimination. We cannot say that that point has been reached here."

There is an inherent uniqueness in the equal protection context of cases involving those municipal services which require capital expenditures. The provision of municipal services to the property of residents is largely a question of priorities which our system of government concedes should be determined by elected officials responsive to the people. Certainly this Court may note the difficulties every city is having in establishing such priorities, especially in an age of bond defaults requiring a reduction of services. For a court of law to straitjacket a municipality in the provision of municipal services based on its subjective determinations of "proper" recipients for the services does no more, in effect, than result in the substitution of the legislative judgment for that of the local elected officials. Such a result violates the doctrine of separation of powers and is not compelled by a reading of this Court's interpretations of the Equal Protection Clause of the Fourteenth Amendment.

II. To Resolve Conflicts Within and Among the Circuits and State Courts Concerning the Standard of Review of the Equal Protection Clause Applicable to Furnishing Municipal Services.

There is a lack of uniformity among the courts as to the validity of local legislation providing for refuse collection similar to that involved in the instant case. This lack of uniformity results from the courts' failure to analyze the nature of the constitutional interest at issue, as well as the willingness of the courts to substitute their judgment as to service priority for that of the local elected officials.

As previously noted, the Ohio Court of Appeals' opinion in the instant matter conflicts with the *Goldstein v. City of Chicago* case. *Goldstein*, in turn, is at variance with a decision involving a similar ordinance of the City of Detroit. *Alexander v. City of Detroit*, 392 Mich. 30, 219

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N.W. 2d 41 (1974), *reversing*, 205 N.W. 2d 825 (Mich. Sup. Ct. 1973). In turn, one New Jersey Court has declared unconstitutional an ordinance excluding garden type apartment houses from refuse collection, while another New Jersey Court has, as a practical matter, upheld the limitation of municipal garbage pickup to apartment complexes by approving curbside service only. *Compare Boulevard Apartments, Inc. v. Mayor and Council of the Borough of Lodi*, 110 N.J. Super. 406, 265 A. 2d 838 (Super. Ct. 1970) *with Pleasure Bay Apartments v. City of Long Branch*, 66 N.J. 79, 328 A. 2d 593 (1974).

Another New Jersey court invalidated a similar "curbside only" service requirement. *Teagen Co. v. Borough of Bergenfield*, 119 N.J. Super. 122, 290 A. 2d 753 (Super. Ct. 1972). See also *Leimpeter's Disposal Service, Inc. v. Borough of Carteret*, 121 N.J. Super. 18, 295 A. 2d 411 (1972) (upholding ordinance prohibiting proprietary waste collectors from disposing of non-residential waste in municipal disposal area). Further, although the Court of Appeals in the instant case did not consider the municipality's cost argument persuasive, in *507 Island Corporation v. North Bay Village*, 236 So. 2d 467 (Fla. Ct. App. 1970) the Florida Court of Appeals upheld an ordinance which imposed a higher charge on owners or operators of apartment buildings for garbage collection than that imposed on condominium owners or operators.

The foregoing cases, dealing only with the provision of municipal solid waste collection, point out the conflicts and confusion among the courts in applying the equal protection analysis to the furnishing of municipal services. Considering the breadth and scope of the services presently furnished by municipalities, petitioners respectfully submit that this Court should determine and resolve the conflict

within and among the lower courts as to the proper analysis to be applied in the challenge under the Equal Protection Clause in the furnishing of municipal services.

CONCLUSION

For the reasons set forth above, it is respectfully prayed that a writ of certiorari be issued as petitioned herein.

Respectfully submitted,

PAUL W. WALTER
CHARLES T. RIEHL
WALTER, HAVERFIELD, BUESCHER & CHOCKLEY
1215 Terminal Tower
Cleveland, Ohio 44113
Telephone: 781-1212
Attorneys for Petitioner

Of Counsel
PATRICK R. ROCCO
Law Director, City of Euclid
HENRY B. FISHER
Assistant Law Director, City of Euclid

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APPENDIX

ORDER OF SUPREME COURT OF OHIO DISMISSING APPEAL

(Dated December 5, 1975)

No. 75-947

THE SUPREME COURT OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS.

ROYAL AMERICAN CORPORATION *et al.*,
Appellees,

vs.

CITY OF EUCLID,
Appellant.

APPEAL FROM THE COURT OF APPEALS
FOR CUYAHOGA COUNTY

This cause, here on appeal as of right from the Court of Appeals for Cuyahoga County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

ORDER OF SUPREME COURT OF OHIO OVERRULING MOTION TO CERTIFY RECORD

(Dated December 5, 1975)

No. 75-947

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS.

ROYAL AMERICAN CORPORATION *et al.*,
Appellees,

vs.

CITY OF EUCLID,
Appellant.

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS FOR CUYAHOGA COUNTY TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

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OPINION AND JOURNAL ENTRY OF THE COURT OF APPEALS

(Filed August 21, 1975)

Case No. 34018

COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
EIGHTH APPELLATE DISTRICT

ROYAL AMERICAN CORPORATION, *et al.*,
Plaintiffs-Appellants,

vs.

CITY OF EUCLID, OHIO,
Defendant-Appellee.

JOURNAL ENTRY

This cause came on to be heard upon the pleadings and the transcript of the evidence and record in the Common Pleas Court, and was argued by counsel; on consideration whereof, the court certifies that in its opinion substantial justice has not been done the party complaining, as shown by the record of the proceedings and judgment under review, and judgment of said Common Pleas Court is reversed. Each assignment of error was reviewed by the court and upon review the following disposition made:

On July 19, 1974, the plaintiff-appellant, Royal American Corporation, hereinafter referred to as the appellant, filed a complaint in the Common Pleas Court of Cuyahoga County against the defendant-appellee, the City of Euclid, Ohio, hereinafter referred to as the appellee. In the complaint, the appellant alleged that it was an Ohio corporation and a resident and taxpayer of the City of

Euclid; that it was engaged in the real estate business; that it owned and operated in Euclid a multiple dwelling known as Willo-Arms Apartments; that the Willo-Arms consisted of approximately 740 suites; that prior to March 1, 1972, the appellee through its Service Department had picked up and collected the garbage and rubbish of the tenants of the Willo-Arms, but that since March 1, 1972, the appellee had failed and refused to pick up the tenants' garbage and rubbish despite demand upon it to do so; and that these same situations, before and after March 1, 1972, existed for other apartment owners and their tenants.

The appellant further alleged that on February 19, 1974, the Council of the City of Euclid enacted Ordinance 49-1974, which was to be in full force and effect from July 1, 1974; that the appellee had refused to afford the occupants of Willo-Arms Apartments, and the occupants of apartments owned by others similarly situated, the same treatment it afforded other residents of Euclid relating to the collection of garbage and rubbish; that since March 1, 1972, the appellant and others similarly situated had been compelled to remove their own garbage and rubbish at their own great cost; that the appellee's refusal to collect the garbage and rubbish of the tenants of its dwelling, and that of all others similarly situated, constituted a denial of equal protection under the law and an arbitrary discrimination; that Ordinance 49-1974 constituted a denial of equal protection under the law and an abuse of municipal power; and that unless the appellee was enjoined from continuing to follow the ordinance it and others similarly situated would suffer irreparable damage for which there was no adequate remedy at law.

The appellant concluded its complaint by praying that the appellee be enjoined from failing and refusing to collect garbage and rubbish of its tenants and all others similarly

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situated. It further prayed for damages suffered by it and others similarly situated, for attorney fees, and costs.

A copy of Euclid Ordinance 49-1974 was attached to the complaint. The pertinent portion of that enactment, 941.26, reads:

"941.26 STRUCTURES EXCLUDED.

"The City will not collect any solid waste materials from (1) any apartment or condominium structures or (2) any commercial structures in the City of Euclid."

On August 26, 1974, Perma Investment Company, Inc., and Elmack Investment Company filed a motion to be joined as additional parties plaintiff for the reason that they held bare legal title to the Willo-Arms property. The motion to join was granted by the trial court. Hereinafter, the term "appellants" shall include Royal American Corporation, Perma Investment Company, Inc., and Elmack Investment Company.

On August 26, 1974, the appellee, the City of Euclid, filed an answer to the appellants' complaint. In the answer, the appellee presented several defenses. In one of the defenses the appellee stated that solid waste collection service to less than half of the apartments in the City had been terminated on March 1, 1972, in response to reduced personnel, materials, equipment and funding ordinance provisions. The appellee also stated that an additional reason for the termination of apartment collection service was the enactment of Ordinance 49-1974 with its specific classifications determining eligibility for collection service. The appellee pointed out that this ordinance was enacted in February, 1974, in response to a judgment by the trial court in a related Common Pleas Court case numbered 904,622.

The case came on for trial before the court alone on August 26, 1974. The record before the trial judge consisted of eleven stipulations between the parties, pertinent portions of the record in the prior related case numbered 904,622, the testimony of two witnesses for the appellee, and a variety of exhibits.

On September 3, 1974, the trial court entered judgment for the appellee. It denied the appellants' demand for an injunction and specifically held that Euclid Ordinance 49-1974 was a constitutional enactment and classification by the Council of the City of Euclid.

On September 13, 1974, the appellants filed a timely notice of appeal. They assign two errors:

> "I. The trial court erred in failing to make the requested findings of fact and conclusions of law.
>
> "II. The trial court erred in ruling that City of Euclid Ordinance 49-1974 created a reasonable classification and was constitutional."

Both assigned errors are well taken. We reverse the judgment of the court below.

Assignment of Error No. I:

> "The trial court erred in failing to make the requested findings of fact and conclusions of law."

Rule 52 of the Ohio Rules of Civil Procedure provides in part:

> "When questions of fact are tried by the court without a jury, judgment may be general for the prevailing party unless one of the parties in writing or orally in open court requests otherwise *before the journal entry of a final order, judgment, or decree has been approved*

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by the court in writing and filed with the clerk of the court for journalization, or not later than seven days after the party filing the request has been given notice of the court's announcement of its decision, whichever is later, in which case, the court *shall* state in writing the conclusions of law." (emphasis supplied)

The wording of the rule is such that when a timely request for findings of fact and conclusions of law is made, the trial court has a mandatory duty to draft them. Refusal to do so in response to a proper request constitutes prejudicial error. See *Orlow v. Vilas* (1971), 28 Ohio App. 2d 57.

In the present case, the trial court entered judgment for the appellee on September 3, 1974. The appellants moved for findings of fact and conclusions of law on September 5, 1974. Rule 52 specifically allows the request for findings and conclusions to be made before a final judgment is filed with the clerk for journalization or not later than seven days after the filing party receives notice of the court's announcement of decision, whichever is later. Here the trial court, on September 3, filed the final judgment with the Clerk of Court and announced the decision at the same time on September 3. The appellants, therefore, had seven days from September 3, to make their Rule 52 request. The request was timely made on September 5, 1974. The appellants' first assignment of error is well taken. The trial court's failure to draft findings of fact and conclusions of law constituted prejudicial error.

Assignment of Error No. II:

"The trial court erred in ruling that City of Euclid Ordinance 49-1974 created a reasonable classification and was constitutional."

The appellants' second assignment of error is also well taken. Ordinance 49-1974, which classifies apartments differently from single and two-family dwellings, denies apartment dwellers the same rights vouchsafed their counterparts in two-family dwellings. The latter have a right to garbage and rubbish collection service. The former do not. The ordinance is unreasonable, discriminatory, and invalid. Revised Code §175.43 permits a municipality to provide for the collection and disposition of garbage and rubbish and to maintain plants for its disposal. However, any municipal legislation relating to garbage collection and disposal enacted pursuant to this statute must be reasonable and not arbitrary or oppresive. See McQuillin, *Municipal Corporations* (rev. ed. 1968), §24.245, at 87. Legislation limiting the collection of garbage or rubbish to certain classifications is permissible as long as there is no arbitrariness or discrimination in the establishment of the classifications. But where a classification prevents a service from being available to all persons in like circumstances then the classifications established deny equal protection of the law. See *Boulevard Apts., Inc. v. Mayor and Council of Lodi* (1970), 110 N.J. Super. 406.

Euclid Ordinance 49-1974 places apartments in one category and single-family and two-family dwellings in another. The classification is based upon the nature of the buildings involved, the volume of garbage produced in each, and the cost of collection of such garbage. The classification does not take cognizance of the fact that people in apartments and people in single- or two-family dwellings produce the same type of refuse. Citizens living in both types of residences require the removal of their garbage and rubbish on a regular basis for health and safety reasons. There is no rational basis for the municipal decision

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not to collect garbage from inhabitants of apartments on the one hand and to collect it from inhabitants of residential dwellings on the other. Thus, Ordinance 49-1974 contravenes the principle of equal protection. See *Yick Wo v. Hopkins* (1886), 118 U.S. 356, 373-374, 30 L.Ed. 220, 227.

Reversed and remanded for further proceedings according to law.

No other error appearing in the record, this cause is reversed and remanded to the Common Pleas Court for further proceedings according to law.

It is therefore considered that said appellant recover of said appellee their costs herein.

It is ordered that a special mandate be sent to said Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

DAY, *P. J.*, MANOS, *J.*, concur.

/s/ JACK G. DAY
Presiding Judge

PARRINO *J.*, dissents. (See Parrino, J.'s Dissenting Opinion incorporated by reference and made a part of this Journal Entry.)

PARRINO *J.*, Dissenting, in Part, and Concurring, in Part.

As to assignment of error number two, I do not agree that Euclid Ordinance 49-1974 contravenes the principle of equal protection of the law. Euclid has distinguished

the garbage collection problems of apartment, condominium and commercial structures from single and two-family residential structures for the quite real reasons of cost and the amount of refuse generated by such larger structures. Moreover, the amount of refuse generated by apartment and condominium structures can only practicably be collected and disposed of using the containerization or "dumpster" method as opposed to the use of scores of standard size garbage cans, which if left for collection within a limited curbside area as in the single family residence fashion would produce an eyesore and health danger. *Cf. Teager Co. v. Bor. of Bergenfield* (Law Div. 1972), 119 N.J. Super. 212. The collection of such greater amounts of refuse from larger, heavier "dumpster" containers would, according to the evidence, require substantial capital expenditure by Euclid for trucks equipped to handle "dumpster" containers and additional refuse treatment facilities. These considerations form the rational basis for separate classification of single and two-family residences from apartment, condominium and commercial structures for city garbage collection.

The majority concludes that all persons in like circumstances are not treated alike. Apartments and condominiums, comprised of three or more residential units constitute a system of cohabitation that can and, according to the evidence, in Euclid often does reach the proportion of single structures with populations in the hundreds. The advantages of apartment or condominium living in economy or convenience are not relevant here. What is relevant is the fact that apartment or condominium living concentrates large amounts of garbage at a single location, a fact which makes the collection of such garbage economically unfeasible for Euclid at this time.

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Therefore, it is my conclusion that persons who choose to live in apartment or condominium structures are living in circumstances unlike those who live in single or two-family residential structures. It is therefore not a denial of equal protection of the law to deny municipal refuse collection to apartment and condominium dwellers.

The majority relies upon a 1970 New Jersey Superior Court decision, *Boulevard Apts.*, to sustain its conclusion of a denial of equal protection. The New Jersey Supreme Court, however, has recently ruled in *Pleasure Bay Apts. v. City of Long Branch* (1974), 66 N.J. 79, 328 A.2d 593, that a municipal determination to collect garbage only at curbside—thus practically foreclosing garbage collection to apartment structures—did not amount to invidious discrimination, did not deny due process, and did not deny equal protection of the law to owners of garden apartment complexes. The *Pleasure Bay* court found that the structures of garden apartment complexes constituted real differences from single family-type residential units in the collection of garbage and further found the cost considerations for the city to equip for "dumpster" collection provided a reasonable basis for the municipal decision to limit its garbage collection to only curbside service. *Id.*, 328 A.2d at 602-603.

I would therefore overrule the second assignment of error.

JOURNAL ENTRY OF THE COURT OF COMMON PLEAS

(Filed September 4, 1974)

Case No. 931403

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

ROYAL AMERICAN CORPORATION, *et al.*,
Plaintiffs,

vs.

CITY OF EUCLID, OHIO,
Defendant.

JOURNAL ENTRY

Upon trial on the merits of this matter, the court finds that Euclid Ordinance 49-1974, passed February 19, 1974, is a constitutional enactment and classification by the Council of the City of Euclid.

IT IS ORDERED, ADJUDGED AND DECREED that plaintiffs' motion and demand for a preliminary and permanent injunction are denied; judgment is entered for the City of Euclid at plaintiffs' costs.

/s/ DANIEL H. WASSERMAN
Judge

SUPREME COURT, U. S.
Supreme Court, U. S.
FILED
MAR 25 1976
MICHAEL RODAK, JR., C

Supreme Court of the United States

October Term, 1975
No. 75-1242

CITY OF EUCLID, OHIO,
Petitioner,
vs.
ROYAL AMERICAN CORPORATION, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF OF RESPONDENTS IN OPPOSITION

DONALD N. JAFFE
ROEMISCH AND WRIGHT
800 National City Bank Building
Cleveland, Ohio 44114
(216) 241-4755
Attorney for Respondents

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

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Supreme Court of the United States

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CITY OF EUCLID, OHIO,
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Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF OF RESPONDENTS IN OPPOSITION

The citations to the other opinions and journal entries entered herein and the jurisdictional statement as stated by the petitioner are correct. The singular issue before the Court is whether a legislative enactment which provides for once a week waste collection at single and two family dwellings, but excludes such collection at apartments and condominiums, constitutes an arbitrary and discriminatory classification which denies to the owners and occupants of the excluded dwellings constitutional rights under the Equal Protection Clause of the Fourteenth Amendment.

In addition to the statutes cited by petitioner, the Court is referred to the following:

Ohio Constitution, Article XVIII, Section 3 (Home Rule Provision):

"Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitation and other similar regulations, as are not in conflict with general laws."

Ohio Revised Code Section 715.43:

"Any municipal corporation may provide for the collection and disposition of sewage, garbage, ashes, animal and vegetable refuse, dead animals, and animal offal, and may establish, maintain, and regulate plants for the disposal thereof."

STATEMENT OF THE CASE

The instant matter finds its origins in March of 1972. Prior to that time, the Service Department of the City of Euclid had collected rubbish and garbage of tenants and occupants of respondent as well as apartments and condominiums of others. Effective March 1, 1972, however, the City of Euclid, through its Mayor and Service Director, discontinued waste collection from all apartments in the City for purported reasons of financial restrictions. The service to condominiums, although initially suspended, was reinstated.

As a result of that action, Royal American Corporation brought suit in the Court of Common Pleas of Cuyahoga County against the City of Euclid. (That suit was designated as Case No. 904,622; the trial court's decision is part of the record in this case.) The trial court, in that case, held

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that it was illegal for the Mayor and Service Director to unilaterally discontinue the waste collection from apartments; however, the Court proceeded to make certain comments regarding classifications of dwellings which could or could not be serviced. The trial court granted a mandatory injunction against the City in favor of Royal American Corporation, but stayed execution of the injunction in order to permit the Euclid City Council to enact legislation. That case was appealed to the Court of Appeals of Cuyahoga County, Eighth Appellate District, by both Royal American Corporation and the City of Euclid. (Those cases were designated as Case Nos. 33353 and 33432 and the Court's decision in those cases is set forth herein at Appendix page 19.) The Court of Appeals upheld the trial court's determination that the Mayor and Service Director had acted illegally and beyond their authority in terminating the rubbish and garbage collection service to apartments. Regarding the trial court's discussion of dwelling classifications, the Court of Appeals indicated that such comments by the trial court were far beyond the scope of the issues in that case and, therefore, constituted only dicta and ". . . had no real bearing on the relief as sought, or what was reasonably to be included within the decision and order." The Ohio Supreme Court, upon review, denied the motion to certify by Royal American Corporation, and the cross motion to certify by the City of Euclid.

The petitioner's factual statement, contained on page 6 of its petition, to the effect that the Ohio courts indicated that the classification involved in the instant case would be proper if done legislatively is a misstatement. It is true that the trial court, in the prior case, so intimated, and it may have been on that basis that the Council of the City of Euclid enacted the Ordinance which is in question in this

case; however, the trial court's action was clearly repudiated by the Court of Appeals of Cuyahoga County.

While Common Pleas Case No. 904,622 was traveling through the appellate courts, the City Council of Euclid, on February 4, 1974, enacted Ordinance 27-1974. On February 7, 1974, plaintiffs, by their counsel, wrote to the Law Director of the City of Euclid requesting that the Law Director seek repeal of Section 941.26, Codified Ordinances of Euclid, which was enacted in Ordinance 27-1974 or obtain an injunction restraining the enforcement of said Ordinance. No reply was ever received to said correspondence although it was received by the Law Director. On February 19, 1974 the Euclid City Council enacted Ordinance 48-1974 which did repeal Ordinance 27-1974 but at the same time it enacted Ordinance 49-1974 which was virtually identical to Ordinance 27-1974. Both Ordinance 27-1974 and Ordinance 49-1974 dealt with the enactment of a new Section 941.26 of the Euclid Codified Ordinances which states as follows:

> "The City will not collect any solid waste materials from (1) any apartment or condominium structures or (2) any commercial structures in the City of Euclid."

The full text of Ordinance 49-1974 is set forth at pages 3-4 of the City's petition for certiorari. It is the constitutionality of Ordinance Section 941.26 which is the subject of the instant case.

On July 19, 1974 Royal American Corporation,[1] owner and operator of an apartment dwelling in the City of Euclid filed a taxpayer's suit under Ohio Revised Code

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1. On August 26, 1974 Perma Investment Company, Inc. and Elmack Investment Company joined as additional parties plaintiff as they held the bare legal title to the apartment property.

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§ 733.59[2] against the city contending that Section 941.26 was unconstitutional and that apartments and condominiums were entitled to the same and equal service as that afforded to single and two family dwellings.

On September 3, 1974 the trial court issued a judgment entry holding that Section 941.26 was constitutional and was a reasonable classification. On September 13, 1974 an appeal was filed by Royal American Corporation to the Court of Appeals. On August 21, 1975 the Court of Appeals entered its journal entry and opinion holding that Section 941.26 enacted in Ordinance 49-1974 did create an unreasonable classification and discrimination against owners and occupants of apartment dwellings and that such arbitrary and unreasonable classification was improper and unconstitutional.

On December 5, 1975 the Ohio Supreme Court dismissed the City's appeal thereby upholding the decision of the Court of Appeals.

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2. The statute provides: "If the solicitor fails, upon the written request of any taxpayer of such municipal corporation, to make any application provided for in Sections 733.56 to 733.58, inclusive, of the Revised Code, such taxpayer may institute suit in his own name, on behalf of the municipal corporation. Any taxpayer of any municipal corporation in which there is no solicitor may bring such suit on behalf of such municipal corporation. No such suit or proceeding shall be entertained by any court until the taxpayer gives security for the cost of the proceeding."

ARGUMENT

A legislative enactment providing for waste collection at single and two family dwellings, but excluding such collection at apartments and condominiums, constitutes discriminatory classification and denies to the owners and occupants thereof equal protection under the Fourteenth Amendment.

Under Ohio Revised Code, Section 715.43, and under the Home Rule Clause of Article XVIII, Section 3 of The Ohio Constitution, a home rule municipality such as the City of Euclid, has the power and general authority to provide for the collection of garbage, refuse and solid wastes. The City of Euclid provides for this subject matter under Chapter 941 of its Codified Ordinances.

The law in Ohio is clear that when a municipality undertakes to provide for municipal rubbish and garbage collection, it is performing a governmental function and acting in the exercise of its police power. *State ex rel. Moock v. City of Cincinnati*, 120 Ohio St. 500 (1929) and *Broughton v. City of Cleveland*, 167 Ohio St. 29 (1957).

As the Court of Appeals stated in its decision:

> "Revised Code Section 751.43 permits a municipality to provide for the collection and disposition of garbage and rubbish and to maintain plants for its disposal. However, any municipal legislation relating to garbage collection and disposal enacted pursuant to this Statute must be reasonable and not arbitrary or oppressive." (page A8, Petition for Certiorari.)

The Court of Appeals was totally correct in its analysis of Ordinance 49-1974 when it noted that the classification ". . . denies apartment dwellers the same rights vouchsafed their counterparts in two family dwellings."

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(page A8, Petition). The Court also noted that the classification set forth in Ordinance 49-1974 was made upon the basis of the physical structure of the building and the costs of collection and did not take cognizance that people in apartments and people in single or two family dwellings produce the same type of garbage and refuse. The Court stated (pages A8-A9, Petition):

> "Citizens living in both types of residences require the removal of their garbage and rubbish on a regular basis for health and safety reasons. There is no rational basis for the municipal decision not to collect garbage from inhabitants of apartments on the one hand and to collect it from inhabitants of residential dwellings on the other. Thus Ordinance 49-1974 contravenes the principle of equal protection. See *Yick Wo v. Hopkins* (1886), 118 U.S. 356, 373-374, 30 L. Ed. 220, 227."

There are a number of cases which clearly support the logic and decision of the Ohio Supreme Court and the Court of Appeals.

In the case of *Leroy Franz, Inc. v. City of New Rochelle*, 124 N.Y.S.2d 525 (Sup. Ct., 1953), the Court was faced with a situation where the plaintiff was the owner of a 14 story commercial and office building. The City had enacted an Ordinance limiting collection from commercial activities to two cartons but no such limitation applied to apartments or residences. In fact, the ordinance in question placed apartments in the same classification as single and two family dwellings. At page 528, the Court stated:

> "Classification in legislation is not forbidden. The law merely requires that legislation shall apply equally to all persons similarly situated. Where it so applies, it may not be avoided upon the ground that it ap-

plies solely to a particular class of persons, provided of course, that the classification is not arbitrary or unreasonable."

Additionally, the Court stated at page 528:

"A limitation as to the collection by a municipality of refuse from office, commercial, industrial and similar buildings, in behalf of the owners, occupants or other persons in charge thereof, while assuming full collection from residential properties or units, is not deemed to be in the category of arbitrary and unreasonable class or discriminatory legislation. *The exemption of dwellings and apartments from the provisions for limited collection of garbage and refuse may readily be justified.* This is so, first, because plainly such premises, residential in nature, are reasonably to be placed in a separate class from offices, stores, industrial buildings and other business establishments. Secondly, the bulk of the refuse collected from the former is raw garbage and decaying material, thereby presenting a health problem, while the refuse from business establishments consists generally of readily burnable and disposable material." (Emphasis added)

In the case of *Boulevard Apartments, Inc. v. Borough of Lodi,* 110 N.J. Super. 406, 265 A.2d 838 (Supreme Court, Appellate Division, 1970), the plaintiff was the owner of garden type apartment complexes consisting of six two-story buildings and containing a total of 108 family units. Prior to January 1, 1969 the municipality had collected rubbish from these buildings, but after that date the municipality enacted an ordinance excluding apartments from collection. Plaintiff then brought suit against the municipality contending that the legislation was unreasonable and discriminatory. The municipality had a private contractor doing rubbish and garbage collection and it was testified that if the municipality was required to col-

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lect garbage from garden type apartments it would be exposed to an additional cost of between $75,000-$85,000. The Court also noted that there was testimony regarding comparison of per acre population density of garden type apartment houses and that of ordinary residences. The Trial Court had held that the Ordinance was reasonable on the basis that apartments were not in the same category or classification as other types of residential dwellings "because they were commercial ventures. . . ." (265 A.2d at 840).

The Appellate Court reversed and held that the non-inclusion of apartment dwellings was discriminatory classification. At 265 A.2d 841, the Court stated as follows:

> "We can discern no rational basis for differentiating between garden-type apartment houses and all other residential dwellings, because apartments are rented to tenants and the owner may realize a profit on his investment. The resolution in question makes no distinction between owner-occupied dwellings and those rented for income. The evidence reveals that there are numerous rented multi-family dwellings containing from two to eight family units which are not precluded from receiving municipal garbage collection service. Moreover, the resolution on its face provides for collection from public housing projects and various places of business.
>
> We also find no reasonable justification for the municipality to classify garden-type apartment houses differently from other residential dwellings on the basis of the quantity of garbage produced and the cost of collection thereof. It is apparent that the trial court misunderstood the testimony in arriving at a conclusion that the quantity of garbage produced from each garden apartment family unit was three times that of a private dwelling. The record clearly shows

that the garbage produced by a one-family unit in an apartment house and a one-family dwelling house is substantially the same. Moreover, it is clear that the cost of collection from family units in an apartment house where the accumulated garbage is concentrated in one spot to be picked up at the curb is unquestionably less than the cost of collection from an equal number of family units residing in separate private dwellings.

We conclude that the part of the municipal resolution which classifies garden-type apartment houses separately from other dwelling houses and thereby denies such properties an equal right to garbage collection service is unreasonable, discriminatory and invalid and cannot be enforced."

After *Boulevard Apartments, Inc. v. Borough of Lodi* was reversed, the municipality enacted an ordinance providing that rubbish collection was to be made at curbside only. Suit was then brought claiming that the collection ordinance was discriminatory. The curbside collection ordinance was reviewed by the New Jersey Supreme Court in *Pleasure Bay Apartments v. City of Long Beach,* 66 N.J. 79, 328 A.2d 593 (1974).

Contrary to petitioner's suggestion, the New Jersey Supreme Court, in the *Pleasure Bay Apartments* case, did not criticize or repudiate the *Boulevard Apartments, Inc.* case. *Boulevard Apartments, Inc.* considered substantially the same question involved herein and held that it was discriminatory classification violative of equal protection when a city undertakes waste collection to single family dwellings and not to render equivalent treatment to garden-type apartments. The *Pleasure Bay Apartments* decision considered only the constitutional validity of a method of collection, i.e., curbside service. *Pleasure Bay* reaffirmed the earlier pronouncement that single family

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and multiple family dwellings were entitled to equal treatment.

The New Jersey Supreme Court specifically noted that:

> "The requirement of the defendant that the plaintiffs place its garbage at curbside in small containers containing refuse produced by each apartment is an attempt to circumvent the edict of the court in the case of *Boulevard Apartments, Inc. v. Mayor and Council of Lodi*, 110 N.J. Super. 406, 265 A.2d 838 (1970). (328 A.2d at 595)
>
> * * * * *
>
> "All that a property owner is entitled to is that the municipal action—here the determination to limit the municipal service to curbside collection of garbage and refuse—not deny him due process and equal protection of the laws." (328 A.2d at 599)

The New Jersey Supreme Court held that so long as the curbside service was made available equally to single family and to apartment owners then the Ordinance was constitutional.

In the case of *Leim Peter's Disposal Service, Inc. v. Borough of Carteret*, 121 N.J. Super. 18, 295 A.2d 411 (Superior Court, 1972), the Court had under consideration an ordinance dealing with the mode of rubbish collection in that the ordinance provided that only the municipality had the authority to collect rubbish and garbage. The court upheld the municipality's right to have exclusive control over the rubbish and garbage collection for residential and apartment purposes and made the following observation (295 A.2d, pages 414-415):

> "Different considerations govern municipal treatment of these distinct classes. A municipality may not fa-

vor individual residences over multi family dwellings in providing garbage collection service."

* * * * *

"A municipality must treat its residents alike with respect to municipal waste collection, but it is nonetheless free to prohibit a given means of disposal to further the public health."

In the case of *Teagin Company v. Borough of Burgenfield*, 119 N.J. Super. 212, 290 A.2d 753 (Superior Court, 1972), the Court was faced with a situation where the municipality had experienced a rapid population growth. The Borough had a population of 29,000 with 1,000 multi-family dwelling units situated in multi-family buildings having in excess of six units per dwelling. The plaintiffs in the *Teagin* case were operators of a garden apartment complex containing over 600 dwelling units. The court held that the municipality was required to collect the rubbish and garbage of the plaintiffs and that the municipality's actions in refusing to collect from them in the same manner as collecting from single family residences was in violation of equal protection. At 290 A.2d 758, the Court succinctly observed:

". . . where no attempt has been made to arrive at a classification based on real differences to support a difference in treatment with respect to municipal services, or where the grounds upon which the classification is made are irrelevant to the achievement of the end sought, the governmental action is wholly arbitrary and must be declared such." (Citations omitted)

In 6 UNIVERSITY OF RICHMOND LAW REVIEW 141, *Administration of Municipal Services in Light of the Equal Protection Clause* (1971), the author aptly stated at pages 144-145:

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> "While there is no constitutional necessity for a municipality to provide services to its citizens, once it elects to do so, services must be administered on a nondiscriminatory basis."

Additionally, it was observed that (pages 145-146):

> "The most obvious standard, of course, would be the quality of services enjoyed by those citizens who are favored by discriminatory practices. Any variation from the same quality of service would require further judicial scrutiny to determine whether the classification among citizens is rationally based. Whatever the standard, a check on municipal abuse of discretion within the framework of equal protection of the laws should not be found to be an infringement on separation of governmental powers."

See *Hawkins v. Town of Shaw*, 437 F.2d 1286 (5th Cir., 1971) and compare *Baker v. Carr*, 369 U.S. 186 (1962).

In *Alexander v. City of Detroit*, 392 Mich. 30, 219 N.W.2d 41 (S. Ct., 1974), the Michigan Supreme Court considered the validity of a waste collection ordinance which classified apartments of more than four units as commercial which thus required the payment of fees in order to have the rubbish collected. The Court succinctly ruled (219 N.W.2d at 43):

> "Applied to the instant factual situation we hold that inclusion of multiple dwellings with a more than 4 units in the fee-paying 'commercial waste' category while multiple dwellings with 4 or less units and condominiums and cooperatives were excluded, was a constitutionally improper classification violative of the state and federal guarantees of equal protection. Const. 1963, Art. I, §1, United States Const. Art. XIV, §1."

Additionally, the Court commented at page 45:

"'For Ordinance 442-G to declare that "Domestic waste" in multiple dwellings of more than 4 units is "Commercial waste", is to declare a sudden transformation by name only. *Ordinance 442-G attempted a distinction without a difference* which is arbitrary, unreasonable, and violative of the equal protection clauses of the Federal and State Constitutions.' (506a)" (Emphasis in Original)

"Thus, Detroit City Ordinance 442-G is found to be unconstitutional on equal protection grounds by reason of improper classification of plaintiffs' subject properties. The Court of Appeals is reversed on this score."

The Court's reasoning and the pertinent facts enunciated in *Alexander* are equally applicable to the instant case.

The New Jersey and Michigan courts, and now the Ohio courts, have upheld the respondent's contention that Ordinance 49-1974, or one similar thereto, does create an arbitrary and discriminatory classification, which is not protected or condoned by the U. S. Constitution. The one case which does give some comfort to the City's position is that of *Goldstein v. City of Chicago*, 504 F.2d 989 (7th Cir., 1974). Initially, it should be emphasized that the Court of Appeals concurred with the District Court in observing that: "The determination of the issue presented depends entirely upon a question of state law, i.e., the interpretation of the ordinance." (504 F.2d at 991) Unlike *Goldstein*, all of the cases relied upon by Royal American Corporation are state court decisions involving the interpretations of state law and local ordinance. Additionally, in *Goldstein*, the plaintiffs did not directly attack the constitutional validity of the ordinance, but rather were argu-

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ing as to method and manner of the rubbish collection. The defense in *Goldstein* was that there was no rubbish collection of condominiums and multiple dwellings because there was a specific ordinance prohibiting such collection. Notwithstanding that situation, however, there was no suit directly attacking the constitutional classification of the ordinance. On the contrary, however, in the instant case, in *Alexander v. City of Detroit,* in *Boulevard Apartments, Inc. v. Borough of Lodi* and in *Teagin Company v. Borough of Burgenfield,* a direct attack on the ordinance was made by respective plaintiffs.

Respondent recognizes that the Court, in *Goldstein,* did conclude that a proper class distinction does exist between single family dwellings and multiple family dwellings, notwithstanding that the occupancy of the dwellings is identical, and that this conclusion is not harmonious with the cases cited by this respondent elsewhere in its brief. However, merely because one court has reached a conclusion somewhat different than several other cases, does not, *ipso facto,* mandate or necessitate this Court reviewing that apparent conflict by granting a petition for certiorari. On almost any particular question of law, it cannot be gainsaid that cases supporting either of the respective views could be cited to the Court but the mere existence of differences between certain courts does not require review by this Court.

In the instant case the City of Euclid has sought to differentiate and establish separate classifications based solely on the nature of the physical structure in which a resident of the City of Euclid happens to be living. The testimony was undisputed that the general character of the individuals living in the City of Euclid was residential whether it be in single family or multi family dwellings. The essential aspect is that the character and quality of life in a single family residence is virtually identical to that

existing in a multifamily type structure. The basic individual and family activities which are found in a single family structure are similarly found in a multifamily structure. The garbage and refuse collected for single families are identical to the refuse and garbage collected for multifamilies. To justify a classification in the rendering of rubbish collection based solely on the type of physical structure in which a resident lives is both unreasonable and discriminatory. As the Court, in the *New Rochelle* case, very cogently observed, there are significant differences between activities conducted in residential types of dwellings *vis-a-vis* industrial or commercial, but the activities in one type of residential dwelling *vis-a-vis* another type of residential dwelling are essentially the same. In *Alexander, supra*, the Court said it was a "distinction without a difference" and thus arbitrary.

During the hearing on the merits, the primary thrust of the City, in support of the validity of the ordinance, was the economic necessity of eliminating rubbish and garbage collection from apartments. There was no testimony that there might be alternative methods of financing but simply that under the current budget of the City, rubbish collection would have to be discontinued for apartments. Economic necessity was also the defense in *Shapiro v. Thompson*, 394 U.S. 618, 22 L. Ed. 2d 600, 89 S. Ct. 1322 (1969), however, this Court held that fiscal concerns are subordinate to the constitutional concerns of equal protection. As this Court commented (394 U.S. at 633):

> "We recognize that a state has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures, whether for public assistance, public education or any other program. But a state may not accomplish such a purpose by invidious distinction between classes of its citizens. It could not, for example, reduce expendi-

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> tures for education by barring indigent children from its schools. Similarly in the cases before us, *appellants must do more than show that denying welfare benefits to new residents saves money. The saving of welfare costs cannot justify an otherwise invidious classification.*" (Emphasis added)

Cf. *Hawkins v. Town of Shaw*, 437 F.2d 1286 (5th Cir., 1971).

The City has contended that the rationale and justification of the enactment of Ordinance 49-1974 was for economic reasons. Although various financial, personnel and construction costs regarding waste collection were presented to the trial court, the record is devoid of any such data or information being presented to Council, or any of its committees, at the time that Ordinance 49-1974 was under consideration. There was no legislative history regarding the Ordinance although the minutes of the Council which pertained to the consideration of Ordinance 49-1974 were in evidence before the Court as stipulated exhibits. Nowhere therein is there any discussion of a financial disaster coming to the City of Euclid if Ordinance 49-1974 were not passed. It is also ironic that in the preliminary "whereas" clauses dealing with a statement of reasons for the enactment, the Council specifically made reference to the prior Common Pleas Court decision (Case No. 904,622) but made no reference to any economic plight.

Although the trial court did uphold the constitutionality of Euclid Ordinance 49-1974, the Court of Appeals specifically reversed and held that the classifications in the ordinance were discriminatory. Even though the Ohio Supreme Court did not specifically rule on the merits of the case, the court procedurally did refuse to review the case, thus letting the decision of the Court of Appeals

stand. In this case, therefore, there has been specific and direct review of the constitutionality of Ordinance 49-1974 by the appellate courts of Ohio which have ruled in favor of this respondent. The Ohio Supreme Court stated in its order that there was no substantial constitutional question in this case, and that conclusion likewise should be entertained by this Court.

CONCLUSION

The petitioner has not set forth sufficient and cogent reasons for this Court to intervene and review the decisions of the Ohio appellate courts. The decisions of the highest courts of Michigan, New Jersey and Ohio have substantively upheld respondent's contention and right to equal treatment regarding waste collection by a municipality. For the reasons set forth, it is therefore respectfully prayed that the petition of the City of Euclid, Ohio, for a writ of certiorari to the Supreme Court of Ohio be denied.

Respectfully submitted,

DONALD N. JAFFE, *of Counsel*
ROEMISCH AND WRIGHT
800 National City Bank Building
Cleveland, Ohio 44114
Attorney for Respondents

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APPENDIX

DECISION OF THE COURT OF APPEALS IN CASES NOS. 33353 AND 33432

(Dated August 15, 1974)

IN THE COURT OF APPEALS OF OHIO
EIGHTH DISTRICT, CUYAHOGA COUNTY

No. 33353

ROYAL AMERICAN CORPORATION,
Plaintiff-Appellant,

vs.

CITY OF EUCLID, OHIO, *et al.*,
Defendants-Appellees.

No. 33432

ROYAL AMERICAN CORPORATION,
Plaintiff-Appellee,

vs.

CITY OF EUCLID, OHIO, *et al.*,
Defendants-Appellants.

MEMORANDUM TO LAWYERS

HOLMES, *J.*

This matter involves the appeal of an order as entered by the Common Pleas Court of Cuyahoga County in a matter tried to the court, wherein the plaintiff Royal American Corporation had filed an original action seeking a mandatory injunction as against the defendant City of Euclid,

and its mayor and service director, in order to mandate such defendants to resume the collection of garbage and refuse by the city from the apartment units as owned by the plaintiff corporation.

The facts in brief upon which this appeal rests are as follows. The Royal American Corporation, the plaintiff herein, is the owner and operator of a number of residential apartments in the city of Euclid, Ohio, known as the Willow Arms Apartments. Prior to March 1, 1972, the defendant city of Euclid, through its service department, had collected rubbish and garbage of the tenants and occupants of the plaintiff apartments as well as apartments of other owners. The record shows that the mayor, upon being apprised of the financial condition of the city, informally discussed the matter of garbage and refuse collection with the members of the city council, and told the council members of his determination to send a directive to the service director to discontinue the collection of garbage and refuse to apartment units subsequent to March 1, 1972. There was no specific ordinance as passed by council, discontinuing the service to apartment dwellings.

Such collection service was in fact discontinued to apartment units effective March 1, 1972; however, the record shows that the city did continue to pick up the garbage and rubbish of two condominium dwellings after such date.

The record will show that the city of Euclid continued to pick up refuse and garbage from one-, two- and three-family units, and the record shows that the refuse and garbage collection was also discontinued for all commercial types of stores and buildings.

The plaintiff brought its action seeking a temporary restraining order enjoining defendants from failing and

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refusing to pick up and collect rubbish and garbage of the plaintiff's tenants, and also sought in such action preliminary and permanent injunctions. The complaint also prayed for damages suffered by the plaintiff, for reasonable attorney fees and costs of the suit, and such other and further relief as the court may deem proper.

In the decision of the trial court we find under "Issues and Discussion" the following determinations, in essence, as made by the court that:

1. The instant action was brought for the personal benefit of the plaintiff apartment owner for the benefit and interest of its own activities and not in the interest of all taxpayers of the city of Euclid, and therefore such action was not a taxpayer's action.

2. The remedy of mandatory injunction was the proper procedure in the instant case.

3. The executive officer of a municipal corporation may not act to discontinue a service, but that such action must be by the legislative body.

4. Although the administrative action was improper in establishing classifications for garbage and refuse collection, council could act to establish classifications. [More specifically, the trial court found "that city council through proper legislation can enact classifications as to collection of garbage and refuse consisting of (1) apartments and condominiums; (2) single, two- or three-family units; (3) commercial; (4) industrial.]

5. An award for damages and attorney fees was not proper in this action, in that the trial court had previously determined that such was not a taxpayer's action.

Based upon such conclusions, the trial court granted a mandatory injunction requiring the administrative of-

ficers to resume the collection of garbage and refuse from the plaintiff corporation apartments and all others similarly situated. However, the trial court seemingly limited the effectiveness of its judgment entry by the further holding as follows: "Such mandatory injunction will not become effective until February 18th, 1974, this to permit Council to consider the adoption of legislation establishing classification for collection of garbage and refuse. It is further ordered, adjudged and decreed that if such legislation is adopted the mandatory injunction will not become effective on that date but if legislation is not adopted by Council on that date the mandatory injunction will be effective as of February 18, 1974."

The plaintiff Royal American Corporation appeals the judgment of the trial court, assigning the following assignments of error:

"1. The trial court erred in holding that the lawsuit was not a taxpayer's action.

"2. The trial court erred in holding that attorney fees were not allowable.

"3. The trial court erred in holding that there was no basis for any award of damages."

The defendants, city of Euclid, et al., filed a notice of appeal from the judgment of the Common Pleas Court, and thereafter filed their answer and cross-appeal herein, setting forth four "Assignments of Error." However, numbers II and III of such "assignments of error" of the city of Euclid, et al., are in fact arguments of the assignments of error of the Royal American Corporation, plaintiff-appellant.

Numbers I and IV, which may be considered as the assignments of error of the city of Euclid, are as follows:

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"I. The administrative rules and regulations of the service director in limiting collection to single, double, and triple family dwelling structures was authorized, had the effect of an ordinance, and not an abuse of discretion.

"IV. The trial court erred: in finding an abuse of discretion on the part of the mayor and director of public service; in enjoining the city to collect solid wastes from all apartments in the city, including plaintiff's, in the absence of certain classification legislation; and in failing to modify the injunction to clarify the classification legislation required to avoid the court's injunction."

The plaintiff Royal American Corporation then, on February 14, 1974, filed a motion to dismiss the appeal of of the city of Euclid, Ohio, on the basis that the cross-appeal as filed by the city of Euclid was not timely filed in accordance with Rule 4(A), Rules of Appellate Procedure.

The matter is now before this court, not only upon the merits of such matter, but also upon the question of the motion of the Royal American Corporation to dismiss the cross-appeal of the city of Euclid, Ohio, et al.

The record will show that the judgment entry in this matter was journalized by the clerk of the Common Pleas Court of Cuyahoga County on January 3, 1974. On January 9, 1974, the plaintiff Royal American Corporation filed a notice of appeal from such judgment entry in case number 33353 of this court. The record will show that on February 8, 1974, the defendant city of Euclid, et al., filed their notice of appeal.

Rule 4(A) of the Rules of Appellate Procedure provides that a notice of appeal "shall be filed with the clerk of the trial court within thirty days of the date of the en-

try of the judgment or order appealed from." Such rule also provides that a cross-appeal may be taken within ten days after the notice of appeal is filed or within thirty days, whichever period expires last. The calculation of the appropriate time in the instant case shows that the defendant would have had until February 3, 1974 to properly file a cross-appeal. Such not having been perfected timely, such cross-appeal must upon motion be dismissed.

However, even though we must dismiss the cross-appeal of the city of Euclid, the questions as posed in such cross-appeal may be considered by this court pursuant to other sections of the Rules of Appellate Procedure. Rule 12(A), in pertinent part, states: "The appeal shall be determined on its merits on the assignments of error set forth in the briefs required by Rule 16, on the record on appeal as provided by Rule 9, and, unless waived, on the oral arguments of the parties, or their counsel, as provided by Rule 21. Errors not specifically pointed out in the record and separately argued by brief may be disregarded. * * *"

Further, at Rule 12(B), we find in pertinent part: "* * * In all other cases where the court of appeals determines that the judgment or final order of the trial court should be modified as a matter of law it shall enter its judgment accordingly. * * *"

This matter was submitted to the trial court upon the pleadings, upon the briefs of counsel, and evidence was adduced before the trial court along with exhibits, and all of such matters are now before this court. Even though errors not specifically pointed out in the record and separately argued by brief may be disregarded, this court does not have to so disregard them. Where all of the record that was before the trial court is also before this court, this Court of Appeals may determine that the judgment

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or final order of the trial court should be modified as a matter of law and may enter a judgment accordingly.

Therefore, within the context of having the whole case before it, this court shall review any and all errors that might have taken place within the conduct of the trial of this matter, and enter its judgment accordingly.

We dismiss the first assignment of error of the plaintiff-appellant Royal American Corporation to the effect that the trial court erred in holding that the lawsuit was not a taxpayer's action. Suits by taxpayers are provided for through R. C. 733.59, which section of law provides that if the city solicitor fails, upon the written request of any taxpayer of such city, to make any application provided for in section 733.56 [injunction to restrain the misapplication of funds of the city, the abuse of corporate powers, or the execution or performance of any contract made in behalf of the corporation in contravention of laws or ordinance governing it, or which was procured by fraud or corruption]; 733.57 [specific performance of a contract made on behalf of a city]; 733.58 [mandamus to order an officer or board of a city to perform any duty expressly enjoined by law or ordinance]; then, in such instances, a taxpayer may institute a suit in his own name on behalf of the city.

Further, pursuant to such R. C. 733.59, a taxpayer of any municipal corporation for which there is no solicitor may bring such suit on behalf of such municipal corporation. Additionally, such section provides that no suit or proceeding shall be entertained by any court until the taxpayer gives security for the cost of the proceeding.

The record of this matter before this court, and the pleadings therein, would show that the defendant city of Euclid did in fact have a solicitor who could have

brought such action. Too, there is no showing that the taxpayer first requested such city solicitor or law director to institute such suit, nor that there was any failure of the solicitor to bring such suit after having been asked to do so. Further, it has not been specifically shown that any of the actions as provided for in R. C. 733.56 through 733.58 are such as contemplated within taxpayers' suits as provided. Lastly, there is no showing that this plaintiff taxpayer has paid any security for the costs of such proceeding. Therefore, on these statutory qualifications alone the plaintiff has not qualified as a taxpayer for purposes of a taxpayer's suit.

The basis for the action as brought by a taxpayer pursuant to R. C. 733.59 is to protect rights by and on behalf of the municipality which will inure to the benefit of all of the citizens and taxpayers of such municipality and such action cannot be maintained by an individual taxpayer, or group of individuals for their own capacities and benefits, but may only be brought in the sense of a representative capacity for the community as a whole. *Walker v. Village of Dillonvale* (1910), 82 Ohio St. 137; *Parks v. Cleveland Ry. Co.* (1931), 124 Ohio St. 79; *State, ex rel. Nimon v. Village of Springdale* (1966), 6 Ohio St. 2d 1.

The complaint of the Royal American Corporation evidences that such was being brought for and on behalf of this individual corporation to mandate a reinstitution of services to it, and for damages and attorney fees as alleged to be due such corporation. Such pleading does not set forth a cause of action which seeks the benefits for, nor if successful in the recovery to be shared in by a total group or classification of the citizenry of Euclid. Such complaint does not set forth a class action, and therefore the trial court was correct in this regard, and assignment

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of error number one of the Royal American Corporation is therefore dismissed.

As to plaintiff-appellant's assignment of error number two, to the effect that the trial court erred in holding that attorney fees were not allowable, such assignment must herewith be dismissed in that such case is not the type that any state statute specifically provides for attorney fees as part of the costs thereof, and having previously held that this matter is not a taxpayer's action, the court could not properly have made attorney fees as part of the costs of such case even though the plaintiff may have prevailed in such cause. See *State, ex rel. Scott v. Masterson* (1962), 173 Ohio St. 402, and *Brauer v. City of Cleveland* (1966), 7 Ohio St. 2d 94.

As to plaintiff-appellant's assignment of error number three, relative to the alleged error of the trial court in holding that there was no basis for any award of damages, in like manner such assignment of error must be dismissed, in that such complaint does not state a cause upon which relief for damages can be granted to this plaintiff. Any increase of the expenses of the operation of the plaintiff's apartments by virtue of the costs of garbage and refuse collection, based upon the determination of the city to discontinue such service, is a disadvantage as suffered by the taxpayer based upon a determination by an administrator of a governmental function and the resulting alleged damage is noncompensable as against the governmental entity in the performance or, in this instance, nonperformance of a governmental function.

The major issue involved within this case is that of the claimed illegal delegation of the legislative power of the legislative authority of the defendant municipality. A determination of such issue would require not only a brief review of the law in this regard, but also a review of the

facts in the instant case including the particular ordinance, the activity which is said to be in furtherance of such alleged delegation, and a review of that which was actually being done pursuant to such alleged delegation.

As stated in 38 Ohio Jurisprudence 2d, Municipal Corporations, at section 263: "It is fundamental that public powers conferred upon a municipal corporation and its officers or agents cannot be surrendered or delegated to others." Citing *Cincinnati v. Cook* (1923), 107 Ohio St. 223; *Cleveland v. Piskura* (1945), 145 Ohio St. 144. Also, see *Belden v. Union Central Life Ins. Co.* (1944), 143 Ohio St. 329.

In *Cincinnati v. Cook, supra*, we find the following statement of the general proposition of law as set forth in Judge Matthias' decision, at page 226:

> "This ordinance will not stand the test applied by 1 Dillon on Municipal Corporations (5 ed.), Section 244, from which we quote the following: 'The principle is a plain one that the public powers or trusts devolved by law or charter upon a council or governing body, to be exercised by it when and in such manner as it shall judge best, *cannot be delegated to others.*
>
> "It is stated by 1 McQuillin on Municipal Corporations, Section 382, that 'the principle is fundamental and of universal application that public powers conferred upon a municipal corporation and its officers or agents cannot be surrendered or delegated to others.' • • •
>
> "The principle here involved seems to be of universal application and is probably most concisely stated by Cooley on Constitutional Limitations (7 ed.), page 293, as follows: 'So far as its functions are legislative, they rest in the discretion and judgment of the municipal body entrusted with them, and that body

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cannot refer the exercise of the power to the discretion and judgment of its subordinates or of any other authority.' "

A concise statement of the principle has been set forth by the court in *Parks v. Cleveland Ry. Co., supra,* at page 98, as follows:

"The problem in the instant case is solved by the principle declared in *Field v. Clarke,* 143 U.S. 649, at page 694, 12 S.Ct. 495, 505, 36 L.Ed. 294, where the court quotes with approval from *Locke's Appeal,* 72 Pa., 491, 498, 13 Am. Rep. 716:

" 'The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government.' "

In *State, ex rel. Selected Properties, v. Gottfried* (1955), 163 Ohio St. 469, we find the rule set forth within the decision of the court at page 473:

"The rule is well summarized in the following statement in 37 American Jurisprudence, 778, Section 160:

" 'In accordance with settled principles that no American legislative body can constitutionally and validly delegate to administrative officers an exercise of discretionary power which is arbitrary, it is established that any municipal ordinance which vests an arbitrary discretion in public administrative officials with reference to the rights, property, or business of individuals, without prescribing a uniform rule of action, making the enjoyment of such rights depend upon arbitrary choice of the officers without reference to all persons

of the class to which the ordinance is intended to be applicable, and without furnishing any definite standard for the control of the officers, is unconstitutional, void, and beyond the powers of a municipality. * * *"

In *State, ex rel. Srigley, v. Woodworth* (1929), 33 Ohio App. 406, the court, in the third paragraph of the syllabus, placed the principle in the context of representation with the emphasis being upon the right to have the exercise of the legislative judgment be vested nondelegably within the legislative body. Such paragraph of the syllabus of such case is as follows:

"3. Municipal council cannot delegate to municipal officer power to decide upon legislative matters properly resting in judgment and discretion of council, since members of council are chosen by people to legislate, and public is entitled to their judgment and discretion, and not to judgment and discretion of some other to whom council may confide such power."

Conversely, it has been determined not to be a delegation of legislative power, if that activity as carried out by the administrative authority is only as to the details or the application of the principles, policy or standards as set forth in the legislation.

State, ex rel. Campbell, v. Cincinnati Street Railway Co. (1918), 97 Ohio St. 283, administrative board given authority to grant permit to operate public utility, where terms and conditions are specified in ordinance; *State, ex rel. Moock, v. City of Cincinnati* (1929), 120 Ohio St. 500, where city ordinance left the power with administrator to determine the terms and conditions under which permits for citywide garbage collection would be issued, but where ordinance had provided for specifications and competitive bids for such collection; *Yee Bow v. City of Cleveland*

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(1919), 99 Ohio St. 269, where the court held there to be no unlawful delegation, where the ordinance provided that an administrative officer could ascertain the health and sanitary conditions of the premises before issuing a license to conduct a laundry.

There is no question that the legislature of the state of Ohio has, by R. C. 715.43, granted to cities the general authority to provide for the collection of garbage, refuse and solid wastes.

Further, the Constitution of the state of Ohio, within the Home Rule Power of Municipalities, as contained within Article 18, Section 3, provides the basic authority for municipalities to perform such functions.

In the instant case, the city of Euclid has enacted a chapter of their city codified ordinances for just such a purpose. None of the sections of such chapter specifically state that it is the intent of such legislation to provide for the general collection of all of the garbage, trash or solid wastes of all of the citizens of the municipality; however, as stated by the trial court in his decision, "the language employed throughout the chapter clearly establishes the intent of council to engage in such a service." We shall allude to a number of references in the Euclid ordinance which, if they do not "clearly establish the intent of council to engage in such service," certainly give rise to a reasonable inference thereof.

"Sec. 941.02 Waste Not Collected

"(a) Except as otherwise herein provided, the city will not collect the following waste materials:

"* * * [then such noncollectable items are listed.]

"(b) [in this section those items which will neither be collected nor disposed of are listed.]"

Generally, then, relating to such section, it may reasonably be assumed that if the ordinance listed those items that would not be collected by the city, all others would be collected by the city.

"Sec. 941.06

"(a) The individual tenants of any dwelling, building or structure shall be responsible for providing and maintaining suitable approved containers for the disposal of waste materials when the dwelling, building or structure contains from one to five families inclusive.

"(b) The owner of any dwelling, building or structure which contains six or more dwelling units shall provide at least one garbage container of a capacity not less than one cubic yard and manufactured of a metal not lighter than sixteen gauge. If one container is not sufficient then the owner shall provide as many additional containers as may be required to serve the dwelling units. * * *"

Such section provides for the type of refuse containers as to be provided by the tenants in structures with one to five-family units, and by the owners of any building which contains six or more dwelling units. Again, such section would allude to the general intent of the city to provide for the refuse collections of all sizes of buildings, with any variable number of dwelling units.

There is to be found within the chapter referred to an additional pertinent section which provides for the service director of the city of Euclid to promulgate rules and regulations related to the collection, storage and disposal of rubbish and garbage. Such section is as follows:

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"941.23 Rules of Service Director

"The Service Director is hereby authorized to make such rules and regulations for the collection, storage and disposal of rubbish and garbage as he may believe necessary in the interest of public health, safety and welfare. Such rules and regulations shall have the same force and effect as ordinances when not repugnant thereto or to the Constitution of laws of the State. Such rules shall be posted for three consecutive weeks in five public places within the City."

As noted by the trial court, and we must agree with such conclusion, the ordinance may be construed in the sense that it provides for a general collection of the garbage and refuse of the municipality, with the exceptions from any such collection as noted within the ordinance itself.

Further, it may be concluded that within the framework of a general collection policy as established by ordinance, the service director may be granted the authority to make reasonable rules and regulations for such collection.

However, we must at this point state that the reasonable rules and regulations as enacted by the service director for carrying out the ordinance could not reasonably have included the formulation of categories or classifications of refuse producing citizens or entities, and the determination by such director as to who among such classifications or categories would, or would not, be provided refuse collection.

We hold the latter determination to be of a legislative nature, the type of determination which we feel the citizens of the municipality of Euclid have elected the members of their city legislative body to perform in their representative capacity.

The municipality, through its legislative officers, may, or may not, choose to provide certain services to its citizens such as refuse collection. Additionally, the legislative body of the municipality may also determine that only certain segments or elements of its citizenry shall be so served.

In keeping with the latter principle, the municipality may provide for certain classifications or categories to be served by the city in a given municipal function. However, any such legislation must be fair, reasonable, and based upon an evaluation of the necessities of the facts and circumstances, and must, in order to satisfy the constitutional equal protection guarantees, treat all similarly within any given classification or category.

In the instant case, we hold that the ordinance is not unconstitutional or invalid upon its face, in that it tends to be written in such a manner as to serve all in the municipality. And, further, the section giving the service director the authority to enact rules and regulations on its face purports only to grant the authority to make such rules and regulations that carry out the mandates of the ordinance, all of such not being unconstitutional.

Here, it is claimed that the mayor and the service director abused their discretion in making a determination allegedly pursuant to the ordinance above referred to, which determination restricted the general pickup of refuse by the city to one-, two- and three-family dwellings.

The record of this matter will show that in fact the mayor, after a discussion with the service director and the finance director, made the determination that the city coffers would not stand the continued pickup of trash from multiple dwelling apartments as well as from one-, two- and three-family dwellings.

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Such a determination was conveyed to, and discussed with, members of the city council who responded with a budget which would acommodate only such a lesser volume refuse pickup.

This act on the part of the city council, argues the city, in its assignment of error number I, constitutes an act of council establishing the categories to be served, and therefore obviates any abuse of discretion on the part of the mayor and the service director in making the determination as to who will be served.

On this latter point, we must disagree with the city. In order for the appropriate classification to be made and, more particularly, in order for the citizens of the municipality to know how such determination was made, and upon what basis, the legislative body must definitively act by ordinance which, in this instance, they did not do. Assignment of error number I of the defendants-appellees, city of Euclid, et al., is therefore dismissed.

The city council not having acted and, in lieu thereof, the mayor and service director having promulgated a rule in substitution of a legislative act, there has indeed been an abuse of discretion as found by the trial court.

As stated previously, municipalities may, or may not, provide services to their residents such as garbage and refuse collection as such municipalities are empowered so to do by constitution and state law. In the instant case of the city of Euclid, such municipality so chose to offer collection services for garbage and solid wastes, and did so through its enactment of chapter 941 of the codified ordinances. We have previously noted herein that a review of such codified ordinances concludes that such services are to be offered generally to the residents of the

municipality of Euclid, and not to any specific areas or categories within such city.

It is further noted within such chapter that the service director has been given the authority to promulgate rules and regulations to carry out the purpose of the chapter relating to the collection of garbage and refuse. It has further been noted that the city has the authority within any such ordinances relating to the provision of services, to provide reasonable classifications or categories of those who will be served in such functions. However, in the instance of this particular chapter 941, there have been no such classifications or categories set forth.

Thus, until such time as reasonable categories and classifications of those to be served are in fact established by ordinance of the municipality of Euclid, all must be served, and collection of garbage and refuse from all the citizens, be it single residence or multiple units, must be accomplished.

In the instant case there is nothing in chapter 941 which would empower the mayor or service director to cancel or discontinue the collection of this refuse from its citizens from certain types of dwellings and to continue the pickup from certain other types of dwellings. The rule-making authority of the service director, as set forth in the ordinance at section 941.23, does not encompass the power or authority to discontinue service, but only to make such rule and regulation to carry out the policy of the legislative body of the municipality.

The trial court, in entering its order, provided that such would become effective at a time subsequent to such order, and stated that the reason for such later effective date was "to permit counsel to consider the adoption of legislation establishing classification for collection of gar-

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bage and refuse * * *" and "if such legislation is adopted the mandatory injunction will not become effective on that date." Further in its opinion, the trial court expressed the view that the city council had the authority to enact reasonable classifications regarding the collection of garbage and refuse and indicated what those classifications should be.

As previously stated, we feel that the trial court was not in error in finding an abuse of discretion on the part of the mayor and the director of public service in promulgating rules which were not authorized under the ordinance relating to refuse and solid wastes. The trial court, however, in its decision and judgment relating to the mandatory injunction, issued such mandatory injunction as against the city on a wider basis than would have been permitted under the action. The court's order mandated the city of Euclid to collect *all* solid wastes from *all* apartments in the City, including the plaintiff's apartments, in the absence of the specified classification type legislation as set forth in the judge's decision. However, the relief as sought in this complaint was applicable to this plaintiff-appellant only, and not to all other apartment owners similarly situated as would have been in the case of a class action.

Further, it is felt that the court's decision and entry relating to the effective date of such mandatory injunction related to the subject matter of further legislation by and on behalf of the council of this municipality, with certain categories or classifications suggested by the judge in his decision, all of which we feel were beyond the necessity of the decision and judgment, and such was therefore merely dicta within the decision and had no real bearing on the relief as sought, or what was reasonably to be included within the decision and order.

As to the portion of defendants-appellees' assignment of error number IV to the effect that the trial court erred in finding that there was abuse of discretion on the part of the mayor and the director of public service, we hereby dismiss on the basis as discussed under defendants-appellees' assignment of error number I. Further, as relates to the portion of assignment of error number IV, relating to the alleged failure of the trial court to modify the injunction to clarify the classification legislation required to avoid the court's injunction, we hereby dismiss same inasmuch as that portion of the trial court's decision in this regard was dicta and the court's judgment entry, through which the court officially speaks, was not specifically based upon, or in reliance upon, a specific following of the court's prior suggestions as to the contents of a future ordinance.

As to that portion of assignment of error IV, relating to the mandatory injunction of the city of Euclid to collect solid wastes from all apartments in the city, including plaintiff's, this, as we noted previously, was an erroneous order and the relief as sought can only be related to the parties involved, in that such action as previously held within this decision was not a class action, but an individual action seeking relief for this complainant only.

Based upon all of the foregoing, the judgment of the Common Pleas Court is hereby affirmed as modified by this decision.

KRENZLER, *P.J.*, and MANOS, *J.* concur.

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RODAK, JR., CLERK

Supreme Court of the United States

October Term, 1975

No. 75-1242

CITY OF EUCLID, OHIO,
Petitioner,

vs.

ROYAL AMERICAN CORPORATION, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF OF AMICUS CURIAE THE CITY OF SHAKER HEIGHTS, OHIO

PAUL R. DONALDSON
Director of Law, City of Shaker Heights
3400 Lee Road
Shaker Heights, Ohio 44120
(216) 752-5000
Attorney for Amicus Curiae

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

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ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF OF AMICUS CURIAE THE CITY OF SHAKER HEIGHTS, OHIO

I

INTEREST OF THE AMICUS CURIAE*

The City of Shaker Heights is a duly chartered municipal corporation of the State of Ohio. Like Petitioner City of Euclid, Shaker Heights provides the service of solid waste collection for single and two-family dwellings within the City, but does not provide such service for apartment, condominium, and commercial structures.

The interest of the City in this case is directed to the

* No letters of consent from the petitioner and respondent to the filing of this brief have been obtained since, under Rule 42 (4), *amicus curiae* City of Shaker Heights need not obtain such consent as a political subdivision of a State which is filing an *amicus curiae* brief sponsored by its authorized law officer.

deleterious effect of the decision below upon the finances and capacity to render municipal services of Shaker Heights and all communities. That decision is the judgment of the Ohio Supreme Court entered on December 5, 1975, dismissing the appeal and overruling Appellant-Petitioner City of Euclid's Motion to Certify the Record to review the decision of the Court of Appeals of Cuyahoga County, Ohio, Eighth Appellate District, filed on August 21, 1975, reversing the decision of the Common Pleas Court of Cuyahoga County, Ohio, filed September 5, 1974. The Ohio Court of Appeals, and implicitly the Ohio Supreme Court by declining to review the decision of the Court of Appeals, held that there was no rational basis for the City of Euclid's practice of collecting solid waste from the inhabitants of one and two-family dwellings, and not collecting solid waste from apartment dwellers. Petitioner City of Euclid's *Petition for a Writ of Certiorari*, at A8, A9. The Court of Appeals concluded that such method of waste collection denied equal protection of the law in contravention of the Fourteenth Amendment to the United States Constitution. *Id.* at A8.

II

ARGUMENT

In the decision below, the Ohio Court of Appeals failed to recognize that there are "necessary imbalances" in all facets of municipal services. For instance, a few years ago, a high-rise office building was constructed in Shaker Heights. As a result, the City had to expend public monies to purchase special fire-fighting equipment to enable the City Fire Department to fight a possible holocaust on the upper floors of the high-rise. This is the primary function of the special equipment. It would not have been necessary to purchase said equipment except for the high-rise.

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The City of Shaker Heights plows snow from the parking lots adjacent to shopping and commercial districts. Thus the City is expending tax dollars to benefit private businesspersons. But these expenditures are for the proper public purposes of encouraging local businesspersons to stay in Shaker Heights, and promoting the patronage of local business by the public.

The City of Shaker Heights expends public funds to landscape and beautify various business areas of the City. However, the money spent on such activity has not been, and cannot be, spent in each and every area of the City. It is hoped that all citizens derive some benefit from the improvements, but businesses and those in closer proximity undoubtedly derive more benefits than those located further away from such public improvements.

While the City Health Department attends to all matters concerning the public health, its budget necessarily is being expended more upon inspection of health and sanitary facilities in commercial districts (i.e., restaurants, foodstores, etc.), than those in residential areas. Almost 80% of local real property taxes are used to support the public schools. Yet many real property taxpayers have no children in public school or have any children at all.

What these few examples point out are that municipal services do not lend themselves to ready "balancing" techniques. In the scheme of local government, all taxpayers are expected to pay their fair share of tax money. These monies are returned to the public by the duly elected local officials in the form of good faith allocations of municipal services.

Certainly if the criteria used by local officials in determining municipal service allocations are clearly based upon bad faith rationales, like suspect classifications such as race, then municipal services are being administered in a manner violative of equal protection. See *Hawkins v.*

Town of Shaw, 437 F.2d 1286 (5th Cir. 1971). But certainly no reasonable individual would posit, for equal protection purposes, that a person having no children in public school should not pay that portion of local real property taxes allocated to schools, or that a person having less need of municipal services than another should have a lower real property tax rate. A legislative body may select one phase of one field and apply a remedy there, neglecting the others. See *Jefferson v. Hackney*, 406 U.S. 535 (1972). "The Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all." *Dandridge v. Williams*, 397 U.S. 471, 486-87 (1970).

In a holding most directly on point to the case at hand, the New Jersey Supreme Court set forth that

> "[n]o case has ever held that a municipality electing to furnish garbage removal services at municipal expense must provide means and facilities which are all inclusive and will insure collection of all garbage and refuse produced in the municipality. All cases which have dealt with the issue have ruled to the contrary. * * * [Citing several cases]."

Pleasure Bay Apts. v. City of Long Branch, 66 N.J. 79, 328 A.2d 593, 599 (1974).

However, the Ohio Court of Appeals and implicitly the Ohio Supreme Court have taken views directly opposite that of the New Jersey Supreme Court and other jurisdictions which have analyzed the municipal service allocation problem at hand. Ohio has struck down as unconstitutional under the Fourteenth Amendment a municipal ordinance which constitutes a legislative allocation of municipal services.

Petitioner City of Euclid estimates that the solid waste collection for apartments mandated by the Ohio courts will cost its taxpayers an estimated $5.5 million in

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additional operating and capital expenses. City of Euclid's Petition, *supra* at 6 - 7. The population of Shaker Heights is slightly over 36,000, about one-half that of Euclid. Therefore, it can reasonably be said that the additional costs of collection equally mandated for Shaker Heights and all Ohio communities which carry out waste collection practices similar to the City of Euclid will increase proportionately to that of Euclid's cost. Therefore, the Ohio courts have levied an additional "tax" upon the citizens of Shaker Heights of about $2.75 million, and many millions of dollars across the State of Ohio.

The compelling reasons underlying the rational basis for the City of Euclid's waste collection being confined to one and two-family residences was ignored by the Court of Appeals. More importantly, the broad, indefinite reasoning of the Court of Appeals is not confined merely to methods of waste collection when that court's reasoning is carried to its logical conclusion. As set forth by the Court of Appeals, ". . . where a classification prevents a *service* from being available to all persons in like circumstances then the classifications established deny equal protection of the law [emphasis added]." See City of Euclid's Petition, *supra* at A8.

Therefore, it is our position that Ohio now mandates all municipal services, which are generally discretionary in nature, to be parceled out to each and every person, whatever the need or however high the cost. For the municipality to do otherwise is, in the eyes of the Ohio courts, violative of equal protection. This, we feel, is a misinterpretation of equal protection of which this Court should be the final arbiter.

III

CONCLUSION

If this Court permits the decision of the Ohio Supreme Court to stand, it will force Euclid, Shaker Heights, and every other community in a similar position to make the choice of raising its operating and capital expenditures by tens of thousands or even millions of dollars for additional waste collection, or to discontinue waste collection altogether, which it properly may do under Ohio law. The municipal power to collect waste is discretionary in nature. See Ohio Revised Code, § 715.43.

Such a great additional expenditure would sorely burden already strained municipal pocketbooks. The City of Shaker Heights would probably have to discontinue all waste collection, or cut back on other vital municipal services. Its taxpayers will not tolerate additional levies for apartment and commercial waste collection.

Furthermore, the decisions of the Court of Appeals and Ohio Supreme Court are strong precedent for the extension of *all* municipal services in *every* community to *all* situations of imbalance in the service allocation equation. This, we feel, is the true import of the case at hand, and this is why *amicus curiae* City of Shaker Heights respectfully requests the Court to grant the Petition for Writ of Certiorari.

Respectfully submitted,

PAUL R. DONALDSON
Director of Law,
City of Shaker Heights
Attorney for Amicus Curiae

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